Melvin there is added the personal sorrow that comes from the death of a lovable man.

LEGAL AID AND LEGAL AID SOCIETIES

It is a proud boast of the lawyer in the United States that every man is equal before the law. The Constitution so provides. Could anything more be asked? It is this complacent satisfaction in the written rule that has been satirized by a distinguished French writer in the observation that the rich and poor are equal before the law: the rich man has the same privilege of sleeping on the benches in the park as the poor man. A change is coming over American lawyers; they are looking away from the abstract rule to see how it works in practice. Of what value to a man is the rule of law in his favor if he cannot pay the expenses of enforcing it? Few people believe that economic and social equality can be achieved overnight. This much, however, can be acomplished: If a man has a legal right, the court should enforce it, irrespective of his poverty. The state has failed in its duty, and the signs of an awakened public conscience are manifested in the growth of legal aid societies, usually founded and supported by private contributions. There is a growing recognition of the public necessity for liberal support of such institutions as the Legal Aid Society of San Francisco. Most significant of all is the action of the American Bar Association. In place of the exclusive consideration of partnership, bills of lading and other technical legal matters, the association has put in the forefront of its program legal aid and legal aid societies and the consideration of the report of the Carnegie Foundation on "Justice and the Poor," by Reginald Heber Smith.

Comment on Recent Cases

ADMINISTRATIVE LAW: THE FEDERAL TRADE COMMISSION: CONSTITUTIONALITY OF ITS INVESTIGATORY POWERS.—Where the Federal Trade Commission, at the instance of the Navy Department, essayed to investigate the cost of producing a patented product, the manufacture of which involved the use of certain trade secrets, and to that end directed the corporate manufacturer to allow investigators "full access" to its books and records, it was held in *United States v. Basic Products Company*[1] that the manufacturer rightfully refused to comply with the demand. The holding rests upon two theories: first, that manufacture is not interstate or foreign commerce,[2] within which fields the jurisdiction

[1] (Dist., W. Dist. Pa., Sept 9, 1919) 260 Fed. 472, a case arising out of the Commission's application for mandamus to enforce its order.

[2] Following Hammer v. Dagenhart (1918) 247 U. S. 251, 62 L. Ed. 1161, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E 724. On the doctrine of this case see William Carey Jones, The Child Labor Decsion, 6 California Law Review, 395.

of the Commission is confined,[3] and second, that the provision of the Federal Trade Commission Act forbidding the Commission to reveal trade secrets[4] precludes their ascertainment for the avowed purpose of disclosure. Under the provisions of the act, as well as upon elementary principles of justice, the holding seems entirely sound. But from the vantage point which it affords there is presented to view the whole vista of difficulties rising out of the inquisitorial powers of the Federal Trade Commission.

That body has a twofold purpose. First, as pointed out in a recent number of this Review,[5] it is a court, purposed to stamp out "unfair methods of competition in commerce," interstate or foreign.[6] Second, it is a board of inquiry to ascertain and report to Congress concerning conditions of trade and the doings of corporations engaged therein,[7] and to ferret out and report violations of the anti-trust laws.[8] To attain either of these ends it must possess inquisitorial powers not narrowly circumscribed.[9] A brief examination of the Federal Trade Commission Act will show that Congress has laid itself open to no charge of parsimony in bestowing them.

In either of its characters the Commission under the statute may gather data in one or both of two ways.[10] It may tap the knowledge of an individual by means of a subpoena, issued by itself,[11] commanding him to appear and testify, or to produce "documentary

[3] Under the definition of § 4 of the act, 38 U. S. Stats. at L., 719, U. S. Comp. Stats., § 8836d, 4 Fed. Stats. Ann., 577, which by the principal case applies to the inquisitorial as well as the judicial powers of the Commission. See Interstate Commerce Commission v. Brimson (1893) 154 U. S. 447, 478, 38 L. Ed. 1047, 14 Sup. Ct. Rep. 1125.

[4] Probably inserted because a trade secret is property, and disclosure thereof would be a taking of property offensive to the Fifth Amendment. Regarding trade secrets see Nims on Unfair Business Competition, p. 418 and ff.; also notes, 19 Columbia Law Review, 233; 6 Michigan Law Review, 57.

[5] 8 California Law Review, 48. In addition to authorities there cited see Charles Willis Needham, The Federal Trade Commission, 16 Columbia Law Review, 175; E. S. Rogers, Some Historical Matter Concerning Trade Marks, 9 Michigan Law Review, 29. Regarding foreign law on this point see Davies, Trust Laws and Unfair Competition, Chapter X; J. F. Iselin, The New German Law of Unfair Competition, 13 Law Quarterly Review, 156.

[6] See § 4, Federal Trade Commission Act, supra, n. 3; also the Act of Sept. 8, 1916, 39 U. S. Stats. at L., 798, U. S. Comp. Stats. § 8836L-8836r, and the Act of April 10, 1918, U. S. Comp. Stats. § 8836¼ a-e.

[7] Federal Trade Commission Act, § 6.

[8] Idem.

[9] Cf. language of the Supreme Court in Interstate Commerce Commission v. Goodrich Transit Co. (1911) 224 U. S. 194, 211, 56 L. Ed. 729, 32 Sup. Ct. Rep. 436.

[10] Federal Trade Commission Act, § 4.

[11] § 9 of the act allows the Commission to invoke the aid of "any court of the United States" in case of disobedience to a subpoena, and disobedience of the court's order may be punished as a contempt. In view of the holding in Interstate Commerce Commission v. Brimson, supra, n. 3, regarding similar powers of the Commerce Commission under § 12 of the Commerce Act, this provision is not open to objection. This was the procedure actually followed in the principal case. In view of the criminal provisions of § 10 of the Trade Commission Act, infra, query however whether it will be the method generally employed?

evidence"; this from "any place in the United States at any designated place of hearing," and with reference to "any matter under investigation." It may reach a corporation (though not a natural person) by demanding for its agents "access" to any "documentary evidence" in the corporation's possession. Since "documentary evidence" is defined to include "all documents, papers, and correspondence in existence at or after the passage of this act,"[12] it is easy to see how broad is the sweep of the Commission's net, surpassing even that of the Interstate Commerce Commission, which latter body is without authority to examine or copy private or confidential correspondence.[13] With the exception of trade secrets and names of customers, any matter ascertained may be published or otherwise disclosed.[14]

If the language of the act, therefore, is the mode and measure of the Commission's power, it requires no ingenuity to perceive the force behind the observation that there is "no longer any right of privacy in business for men who associate as a corporation," and that "an interstate corporation cannot have correspondence too private or confidential to be disclosed."[15]

However, contemplation of the Commission's trenching upon the corporate "right of privacy" through the instrumentality of the subpoena has occasioned no widespread feelings of dismay; perhaps because principles laid down by the Supreme Court considering similar powers of the Commerce Commission may possibly place limits upon the operation of this agency, despite the broad statutory authorization.[16] But the possibility of the Commission's proceeding

[12] Federal Trade Commission Act, § 4.

[13] United States v. Louisville & Nashville R. R. Co. (1915) 236 U. S 318, 335, 59 L. Ed. 598, 35 Sup. Ct. Rep. 363.

[14] Federal Trade Commission Act, § 6. However, if other information should fall under the head of "property" the Fifth Amendment would probably protect it, as suggested in the principal case. See supra, n. 4.

[15] Michael F. Gallagher, The Federal Trade Commission, 10 Illinois Law Review, 31, 41.

[16] The use of the subpoena by an administrative body is not constitutionally objectionable, and its mandate may be enforced provided that "the witness is not excused on some personal ground from doing what the Commission requires at his hands . . . " Interstate Commerce Commission v. Brimson, supra, n. 3. See also Interstate Commerce Commission v. Baird (1903) 194 U. S. 25, 48 L. Ed. 869, 24 Sup. Ct. Rep. 563. In United States v. Louisville & Nashville R. R. Co., supra, n. 13, held that the Commerce Commission could not compel production of a privileged statement; the same rule should apply to the Federal Trade Commission. In Wilson v. United States (1910) 221 U. S. 361, 376, 55 L. Ed. 771, 31 Sup. Ct. Rep. 538, a subpoena addressed to a corporation was held to bind its officers to produce the documents in question, because "the process was definite and reasonable." By implication it would seem that the rule forbidding the use of a subpoena duces tecum as a "drag-net of inspection" might apply here.

An individual subpoenaed to testify probably could not resist on the ground of self-incrimination, for the language conferring immunity is taken directly from that of the Commerce Act, which has been held sufficiently broad to satisfy the Fifth Amendment. Brown v. Walker (1895) 161 U. S. 591, 40 L. Ed. 819, 16 Sup. Ct. Rep. 644.

It would seem that the language of the Trade Commission Act is sufficiently broad to authorize investigation into other matters than violations of the law, which power was denied the Commerce Commission in Harriman v. Interstate Commerce Commission (1908) 211 U. S. 407, 419, 53 L. Ed. 253, 29 Sup. Ct. Rep. 115.

along the second avenue of approach by demanding "access" to an interstate company's files has apparently caused certain writers much concern.[17] And, it must be admitted, there is foundation for their misgivings as to the constitutionality of this procedure.

The theory which would establish unconstitutionality finds a first premise in the axiomatic proposition that one who is compelled to allow another "access" to his private papers is thereby subjected to a search. If the right of access is unlimited, and may be exercised by agents, irresponsible save insofar as restrained by penal provisions,[18] and acting without formality of warrant, the search may well be termed "unreasonable." And if it is to be the instrumentality whereby property is taken away, the whole proceeding may amount to an unreasonable seizure.[19] If a corporation, therefore, is a being entitled to the protection which the Fourth Amendment extends to "the people," it would appear to have valid grounds for objection to any "ruthless invasion of the privacy of papers."[20] And in Hale v. Henkel,[21] the Supreme Court has admitted that for purposes of the Fourth Amendment, corporations may be numbered among "the people."[22]

Further objection might well rest upon those provisions of the act[23] which impose heavy criminal penalties upon "any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce any documentary evidence, if in his power to do so." If this language means that a corporate officer must determine at his peril whether a demand be lawful, on pain of severe punishment if a court subsequently dissent from his interpretation, he is certainly placed, in a most un-American manner, between Scylla and Charybdis, without even a kind Circe to tell how to escape most nearly scathless.[24]

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[17] See particularly a convincing article by Edward S. Jouett, The Inquisitorial Feature of the Federal Trade Commission Act Violates the Federal Constitution, 2 Virginia Law Review, 584; also Russell L. Dunn, The Federal Trade Commission Act, 22 Case and Comment, 935.

[18] § 10 of the Federal Trade Commission Act prescribes penalties for agents or employees who divulge information obtained by the Commission except with the Commission's consent "unless directed by a court." Query, as pointed out by Mr. Jouett, whether an agent could be summoned to testify as to such matters in a suit between private individuals?

[19] See Boyd v. United States (1885) 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524.

[20] Edward S. Jouett, The Federal Trade Commission Act, supra, n. 17 at p. 598.

[21] (1905) 201 U. S. 43, 50 L. Ed. 652, 26 Sup. Ct. Rep. 370. See also cases cited supra, n. 16, for possible further limitations upon the Commission's activity.

[22] Query, however, whether a corporation by engaging in interstate commerce is thereby subjected to federal visitorial power, and precluded from making objection. See Interstate Commerce Commission v. Goodrich Transit Co., supra, n. 9, at p. 215, U. S. report, citing certain statements from Hale v. Henkel, supra, n. 21. And see the specially concurring opinion of Mr. Justice Harlan in that latter case.

[23] § 10.

[24] See Ex parte Young (1907) 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. Rep. 441, and note thereon, 22 Harvard Law Review, 527; also Interstate Commerce Commission v. Brimson, supra, n. 3, at p. 476 and ff., U. S. report.

There is force behind these considerations, particularly in days when many signs and portents point out the truth of Mr. Justice Bradley's warning against "the obnoxious thing even in its mildest and most unrepulsive form," lest the constitution be circumvented by "silent approaches and slight deviations from legal modes of procedure."[25] But so far as the Federal Trade Commission is concerned, wisdom would seem to dictate against present indulgence in hysteria. That body has a useful purpose to perform. Accomplishment of that purpose requires power. Presumably the commissioners are intelligent men, advised by competent counsel. In consequence they may perhaps confine their activities within the bounds of constitutionality. When they no longer manifest inclination to do so, then aggrieved persons may well be trusted to raise the hue and cry.[26] *E. M. P.*

ADMIRALTY: LIMITATION OF LIABILITY.—Must the owner of a tug and tow surrender both vessels in order to limit his liability if the tow, because of negligence on the part of her tug alone, collides with and injures a third vessel? This question has been answered finally by the Supreme Court of the United States in the negative in *Liverpool, Brazil and River Plate Steam Navigation Company v. Brooklyn Eastern District Terminal.*[1] The same answer had been given but a short time before by Judge Rose of the district court of Maryland,[2] and by Judge Haight of the district court of New Jersey.[3] Earlier cases in the Second Circuit had disposed of the question there in the same way.[4] The opposite conclusion, however, had been reached by the circuit courts of appeal of the Sixth and Ninth circuits.[5]

The theory of the latter courts was that the two vessels belonging to the same owner in fact constituted but one ship, because they were engaged in a common enterprise.[6] By adding the fiction that two vessels were one to the fiction that the vessel itself was the wrongdoer, the legal foundation of the owner's right to limit his liability was obscured. That two ships are not one is clear. Within the meaning of the rules of navigation for

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[25] In Boyd v. United States, supra, n. 19, at p. 635, U. S. report.

[26] See for exposition of the theory underlying employment of administrative bodies Mr. Justice McKenna in Mutual Film Co. v. Ohio Industrial Commission (1914) 236 U. S. 230, 59 L. Ed. 552, 35 Sup. Ct. Rep. 387.

[1] (Dec. 8, 1919) 64 L. Ed. Adv. Ops. 85.

[2] The Begonna II (1919) 259 Fed. 919.

[3] The Erie Lighter 108 (1918) 250 Fed. 490.

[4] The Mason (1905) 142 Fed. 913, 74 C. C. A. 83; The Transfer No. 21 (1917) 248 Fed. 459.

[5] Thompson Towing Association v. McGregor (1913) 207 Fed. 209, 124 C. C. A. 479 (Sixth Circuit). The Columbia (1896) 73 Fed. 226, 19 C. C. A. 436; Shipowners' & Merchants' Tugboat Co. v. Hammond Lumber Co (1914) 218 Fed. 161, 134 C. C. A. 575 (both in the Ninth Circuit).

[6] ". . . . both tugs were engaged in a common venture," etc.—Shipowners' & Merchants' Tugboat Co. v. Hammond Lumber Co., supra, n. 5. In Thompson Towing Association v. McGregor, supra, n. 5, limitation of liability was allowed only on surrender of both tug and lighter "because negligently joined in a common enterprise."